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# ***“Corruption by organised crime” – a matter of definition?***

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***Redraft, May 2016.***

## **Abstract:**

The phenomenon of “corruption by organised crime” is the subject of increased attention from policy makers in the UK. This focus is notable, given the limited political and academic consideration of the scope and meaning of this intersecting term.

Both “organised crime” and “corruption” are difficult notions to pin down, definitionally and empirically, and such complexity is compounded by their conjunction. In this paper I problematise the dominant conceptualisation of “corruption by organised crime”, and suggest that it is questionable in an abstract as well as operational sense. Given the ambiguity of the constituent concepts, as well as the implications for the development of criminal justice policy and law, I call for caution in its use. Instead I propose that we refer, and thus respond, to specific manifestations of corrupt practices for different criminal ends.

## **1. Introduction**

“Corruption by organised crime”<sup>1</sup> now is on the political radar in the UK. Once regarded as a foreign concern,<sup>2</sup> or something that relates to policing predominantly,<sup>3</sup> corruption by organised crime is coming to occupy a more obvious position in political discourse and in policy documents.<sup>4</sup> This growing domestic focus echoes the attention paid at the global level. The European Commission emphasises the “social harm” caused by

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<sup>1</sup> Home Office, *Serious and Organised Crime Strategy* (Cm 8715, 2013) para 6.40.

<sup>2</sup> Home Office, *One Step Ahead: A 21<sup>st</sup> Century Strategy to Defeat Organised Crime* (Cm 6167, 2004) 10 and 20; The Scottish Parliament, ‘Corporate Social Responsibility’ (*Brussels Bulletin*, Issue 86, April 2013) <[http://www.scottish.parliament.uk/S4\\_EuropeanandExternalRelationsCommittee/Brussels%20Bulletin/Issue\\_86\\_\\_April\\_2013\\_\(pdf\\_295\\_KB\).pdf](http://www.scottish.parliament.uk/S4_EuropeanandExternalRelationsCommittee/Brussels%20Bulletin/Issue_86__April_2013_(pdf_295_KB).pdf)> at 9, accessed 9 May 2016; National Crime Agency, *National Strategic Assessment of Serious and Organised Crime 2014* (National Crime Agency, 2014) 4. For an assessment of the moral ambivalence of the UK when it comes to bribery overseas see Jeremy Horder, ‘On Her Majesty’s Commercial Service: Bribery, Public Officials and the UK Intelligence Services’ (2011) 74 MLR 911-931.

<sup>3</sup> See Joel Miller, *Police Corruption in England and Wales: An Assessment of Current Evidence* (Home Office Online Report 11/03, 2003).

<sup>4</sup> See Scottish Parliament Justice Committee, 37th Meeting, 1 December, 2004, para 2.7; The Serious Organised Crime Taskforce, *Letting Our Communities Flourish – A Strategy for Tackling Serious Organised Crime in Scotland* (The Scottish Government, 2009) paras 47 and 48; Home Office (n 1) para 6.40; HM Government, *UK Anti-Corruption Plan* (Stationery Office 2014) para 2.1.

“organised crime groups us[ing] corruption to commit other serious crimes, such as trafficking in drugs and human beings”,<sup>5</sup> while the United Nations Convention against Transnational Organised Crime calls for the criminalisation of corruption and the adoption of measures to address it,<sup>6</sup> and the Preamble to the UN Convention against Corruption notes “the links between corruption and other forms of crime, in particular organised crime”.<sup>7</sup>

Such attention obtains despite little consideration of the precise scope and meaning of the term “corruption by organised crime”. Clearly, both “organised crime” and “corruption” are difficult phenomena to identify and define, and such complexity is compounded by their conjunction. These nuances, as well as the implications for operational practice, underline the importance of understanding the term’s meaning as well as its limitations.

In a general sense, we can imagine how corruption could benefit “organised crime”. As I explore more fully below, organised crime entails systematic, profit-driven criminality. While this may involve operations in illicit markets only and the reinvestment of profits back into these activities, we can also envisage interactions with legitimate systems of business and governance, such as in the form of corrupt practices. So, for example, corrupt connections and behaviours could facilitate the flow of information to organised crime groups (OCGs), be that about criminal competitors, state surveillance, investigation, or pending prosecution. Corruption might minimise the risk of detection and state intervention. It may prevent the group resorting to violence; and it may boost competitive advantage and thus ensure the survival and growth of the criminal enterprise. Moreover, as Elizabeth Rowe *et al.* stress, corruption may be used by OCGs as a consequence of enhanced legislative and law enforcement responses, which lead to a “tactical displacement effect”, such that organised criminals attempt to gain “insider knowledge” to reduce the risk of apprehension.<sup>8</sup> Overall, this compromising of individuals and entities for criminal benefit is a strategic manoeuvre by OCGs.

In terms of its manifestations, corruption by organised crime might include the corruption of personnel with access to data systems; officers who are involved in border control, policing, prisons and prosecution services; administrators of such institutions who determine strategy and operational matters; managers in charge of procurement

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<sup>5</sup> Commission, ‘Fighting Corruption in the EU’ (Communication) COM (2011) 308 final 3. Also see *Council Resolution of 21 December 1998 on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it* (Official Journal C 408 of 29.12.1998); Commission, ‘Developing a Strategic Concept on Tackling Organised Crime’ (Communication) COM (2005) 0232 final.

<sup>6</sup> Convention Against Transnational Organized Crime, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001), Article 8.

<sup>7</sup> Convention against Corruption, G.A. res. 58/4, UN Doc.A/58/422 (2003).

<sup>8</sup> Elizabeth Rowe and others, *Organised crime and public sector corruption: A crime scripts analysis of tactical displacement risks. Trends and Issues in Crime and Criminal Justice* Issue 444 (Australian Institute of Criminology 2013).

of goods and services; the judiciary, witnesses, and the jury.<sup>9</sup> Such corruption may be through the cultivation of an intimate or romantic relationship, by appealing to the ego of the corruptee, or through the ability of OCGs first to convince and then pressure or coerce the person.

Beyond these various modes, we might agree that corruption by organised crime causes serious harm. As Sappho Xekanis claims, corruption by organised crime undermines crime control, state control of public bodies, and indeed the broader purpose of public bodies.<sup>10</sup> The particular harms in organised crime itself lie in the commission by a group of systematic, serious criminality, to generate profit. The group element may assist in avoidance of detection due to subdivision of tasks, and ensures endurance of the enterprise. Coupled with this, the investigation and even conviction of some individuals may not compromise the arrangement as a whole, and commitment to the group implies that the offence is more likely to be completed.<sup>11</sup> If the group does resort to violence, it has a ready cohort of members willing to act. Drawing on these factors, it seems that the implications of corruption by organised crime could be greater and graver than when corruption is committed by an individual.

Furthermore, corruption by organised crime can range in form and level from sporadic acts of bribery through to wholesale state capture.<sup>12</sup> Cyrille Fijnaut *et al.* identify three forms of criminal relationships with the “upper world”: parasitical, symbiotic and implantation.<sup>13</sup> In the first instance, contact with the legal economy is limited and operates to benefit the “underworld” only. In terms of symbiosis, mutual interests are advanced, and corruption becomes more significant. And in an implantation scenario, the criminal group is included in the upper world and criminal and legitimate activities are intertwined.

Notwithstanding this apparent consensus as to the gravity and multiplicity of forms of corruption by organised crime, little attention has been paid to the term itself, and to its conceptualisation. As I examine later, corruption involves a person in a trusted position or position of power abusing or facilitating the abuse of that position in return for personal and other gain. In the specific context of “corruption by organised crime” that abuse is by or for an OCG or member thereof, so as to benefit or advance the actions of that group. Here the OCG is acting as the corruptor, with the corrupted party an officer

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<sup>9</sup> See e.g. Philip Gounev and Tihomir Bezlov, *Examining the Links Between Organised Crime and Corruption* (Center for the Study of Democracy, European Commission 2010).

<sup>10</sup> Sappho Xenakis, ‘Organised Crime and the Corruption of Public Institutions in the United Kingdom: Implications for Policy and Practice’ in *Penal Issues* (CNRS-Ministère de la Justice, March 2013).

<sup>11</sup> Law Commission, *Conspiracy and Attempts: A Consultation Paper* (Law Com CP No 183, 2007) para 2.34.

<sup>12</sup> Edgardo Buscaglia and others, ‘Undermining the Foundations of Organized Crime and Public Sector Corruption’ (2005) 114 *Essays in Public Policy* 21.

<sup>13</sup> Cyrille JCF Fijnaut and others, *Organized Crime in the Netherlands* (Kluwer Law International 1998) (1998).

or individual. It is both conceptually and practically important to ascertain the parameters to the term as it is deployed currently, and to unpick why a certain meaning may be invoked in a given setting. Nonetheless, it is neither feasible nor useful to determine one fixed definition, whether that is operationally or legally. Rather, I will identify the ambiguities in the use and understanding of the term, and thus warn against any move towards its embedding, both with respect to criminal justice policy making and legislating.

I begin the paper with a consideration of why definitions are significant, especially in the general criminal justice context. Next I attempt to unravel the conceptual and legal meanings of corruption and organised crime, before focusing on their intersection. My concern is not with some general definition of “corruption”, but with how that term could usefully be defined in the specific context of its use by “organised crime”. I examine the conceptual bases for our understanding of corruption, to determine whether it can involve private actors rather than hinging on public office. Then, in relation to organised crime, I explore whether corruption actually is a necessary component. Building on this, I consider how “corruption by organised crime” might be distinguished from cognate ideas like white-collar crime. Overall I question the term’s use, given its limited explanatory value, and reject any possible influence on the legal sphere. It is not contended that legislation is likely to be introduced - rather that there is a potential development here, predicated on a loose concept, both of which merit attention.

## **2. The role of definitions**

Notwithstanding the evident concern with corruption by organised crime in the UK, very little consideration has been given to what the term means. In the scholarly context, more attention is paid to empirical assessments of the phenomenon<sup>14</sup> and to possible responses<sup>15</sup> than to the preceding step of definitions, though both elements are difficult to realise without such clarity. Corruption by organised crime is not addressed in any existing legislative provisions, and explanations in policy documents are scarce and limited.

Definitions matter. How we depict and delineate a given phenomenon, in the criminal justice context or otherwise, both derives from and goes on to shape our understanding of it. Then the translation of our interpretation of a phenomenon into technical definitions has implications in terms of political and practitioner focus and resource allocation. Beyond this, the enactment of policy definitions into law fixes these political

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<sup>14</sup> See e.g. Gounev and Ruggiero (n 9).

<sup>15</sup> Liz Campbell, ‘Organised Crime and Corruption in the UK: Responding through Law’ [2016] Criminal Law Review 17, Sope Williams-Elegbe, *Fighting Corruption in Public Procurement A Comparative Analysis of Disqualification or Debarment Measures* (Hart Publishing 2012).

choices. These observations draw on the work of Carol Bacchi, who puts forward the view that policy makers shape social “problems” through the ways in which they speak about them and by means of the proposals suggested to “address” them. Her assessment of policy examines “what’s the problem represented to be?” and looks at how policy makers do not merely respond to social problems but act to construct them. This approach brings to the fore the overlooked implications of “problem representations”, given that “how we perceive or think about something will affect what we think ought to be done about it”.<sup>16</sup>

My focus is on the presentation of a particular definition and characterisation of “corruption by organised crime”. Observations about the significance of definitions resonate particularly in respect of such behaviour, given that both of these elements generally occur clandestinely and ultimately comprise the types of behaviour that are looked for and acted against by policing powers. This is in contrast to some other crimes with more settled or obvious boundaries and manifestations. Here, the particular framing of the problem determines what is found, what is responded to, and how. This underlines the importance of our chosen parameters of corruption by organised crime and shows why their explicit articulation is so significant.

Evidently, there is some tension in this respect, between more fluid and general policy definitions on the one hand and specified legal definitions on the other. In this vein, Edwards and Gill spoke of the dilemma between employing “elastic” concepts that can encompass a broad range of practices and thereby facilitate an understanding of how, and if, such practices are connected, and “inelastic” concepts that delimit the focus of inquiry to highly specific activities.<sup>17</sup> So the content of definitions must differ according to the purpose for which they are used: policy statements can be looser as they serve to prompt and animate action, while law by its nature must be more precise.

As the UK’s Anti-Corruption Plan emphasises, the criminal law is a key component in addressing corruption;<sup>18</sup> indeed, this recalls Jeremy Horder’s persuasive defence of the criminalisation of bribery on the basis of prevention of remote harms, as opposed to the adoption of civil measures against it.<sup>19</sup> The significance of the criminal law is evident in the new offences of participation in a criminal organisation<sup>20</sup> and of police corruption,<sup>21</sup> rather than manifesting in any proposed offence of “corruption by organised crime”. While the term appears in policy documents, it is not mentioned in statute books, and there is no drive to criminalise “corruption by organised crime” *per*

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<sup>16</sup> Carol Lee Bacchi, *Women, Policy and Politics: The Construction of Policy Problems*, (SAGE Publications UK 1999) 1.

<sup>17</sup> Adam Edwards and Pete Gill, ‘Crime as Enterprise? – The Case of “Transnational Organised Crime”’ (2002) 37 *Crime, Law and Social Change* 203, 204.

<sup>18</sup> *UK Anti-Corruption Plan* (n 4) 16.

<sup>19</sup> Jeremy Horder, ‘Bribery as a Form of Criminal Wrongdoing’ (2011) 127 *LQR* 37.

<sup>20</sup> *Serious Crime Act 2015*, s 45.

<sup>21</sup> *Criminal Justice and Courts Act 2015*, s 26.

se. Despite this, and while policy definitions and descriptions may be elastic, they still should reflect observable reality; this empirical link cannot be drawn without some degree of definitional certainty, or at the very least some deliberation. Moreover, the unreflective use of contestable terms in a policy context can give the illusion of certainty, be that to the public or to future policy makers or legislators. Fundamentally, it is difficult to have a sensible and informed debate about policy measures unless we know and can identify the problem at which they are aimed.

### 3. Defining the elements

The National Crime Agency (NCA), which leads and supports UK law enforcement in addressing organised crime, has described corruption by organised crime in its most recent National Strategic Assessment of Serious and Organised Crime. The Assessment states: “in a serious and organised crime context corruption is defined as ‘the ability of an individual or group to pervert a process or function of an organisation to achieve a criminal goal’”.<sup>22</sup> The NCA’s definition is broad, and understandably so, given its purpose and the context in which it was framed. There is no focus on public office, and either an individual or group can be the corruptor. The ultimate aim is a criminal act.

Though there is value in this definition, it is not unproblematic. According to the NCA, such corruption is not constituted by an attempt or act to pervert a process, rather the mere ability to do so. Grounding the meaning of corruption on the ability of an individual or group, rather than an attempt or act, suggests more than an inchoate aspect.<sup>23</sup> On the one hand, this breadth is plausible in a proactive policing context where the aim is to disrupt criminal groups and to intervene earlier rather than later, as embodied in the “Pursue” and “Prevent” strands of the Serious and Organised Crime Strategy.<sup>24</sup> Disruption and deterrence are part of the counter-organised crime landscape, and inchoate offenses are central to organised crime prosecutions.<sup>25</sup> On the other hand, I suggest that focusing on mere ability is too remote. Surely the wrong lies in the corrupting action, or in an attempt to so act, not in the mere capacity or potential to do so. It seems unlikely that one could ascertain clearly which parties have this ability; indeed, almost all natural persons could commit all manner of crimes or acts. One may argue that the NCA’s definition is helpful in its emphasis on the process or function of corruption, not on a one-off event. It draws attention to the locus of power, and prompts us to consider from where this ability derives. Nonetheless, such positive

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<sup>22</sup> National Crime Agency, *National Strategic Assessment of Serious and Organised Crime 2015* (National Crime Agency, 2015) para [117].

<sup>23</sup> See Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press, 2012) 142 et seq.

<sup>24</sup> Home Office (n 1) 27-52.

<sup>25</sup> See consideration of s45 of the Serious Crime Act 2015 below, p17.

elements do not allay concerns about the breadth of the definition, which mean it is both over-inclusive and less than meaningful.

Notably, the NCA focuses on “a process or function of an organisation”. This could be criticised on the basis that corruption in fact may not compromise an organisation, but instead challenges the integrity of an individual office holder or State entity. However, one could argue that the definition accommodates this, insofar as the individual concerned may be carrying out “a process or function of an organisation”, if we interpret the latter broadly. Moreover, this lends weight to the idea that corruption should be criminal, or at least the focus of criminal justice agencies, only when it implicates some process or function of an organisation, rather than pertaining to personal relationships and dealings. Furthermore, this statement strays from the traditional understanding of corruption as relating to a particular position or power, though does not exclude it explicitly. So, while the NCA provides a useful starting point in conceptualising corruption by organised crime, the definition is incomplete.

Identifying any sustainable meanings of “corruption by organised crime” requires a closer look at its constituent components. Invoking this term rests on the presumption that we know (or indeed could ever know) what corruption and organised crime mean. Both corruption and organised crime themselves are contested notions, with manifold understandings. Coupling the two can only amplify this complexity. Crucially, their meanings in policy circles do not match scholarly conceptualisations, which differ again from legal definitions. The mismatch operates in different ways; while a legal definition may be more expansive so as to enable effective police and prosecutorial action, it may be more limited if it centres on a certain mode of action or state of mind. For instance, as I explain more fully later, the legal definition of “serious organised crime” in Scotland is broader than most popular and scholarly interpretations of that term, while the legal definition of bribery, while often seen as an analogue to “corruption”, is more restrictive than the latter concept.

I now turn to unpack and distinguish the meanings of both terms, drawing on both theoretical and legal considerations.

### ***a. Corruption***

The term “corruption” denotes a multiplicity of actions and understandings. In the legal sense, it is narrow and ill-defined, and does not constitute a standalone criminal offence. Conceptually, it has various definitional bases, turning on public opinion, public office and public interest. Then in terms of its wrong, there are two competing schools of thought, one focusing on the principal and agent relationship, and the other on the creation of a market where one ought not to exist.

In examining these different dimensions, I do not propose a new or uniform definition of corruption, but rather make two claims that are relevant in mapping possible outlines of



“corruption by organised crime”. First I argue that the inclusion in political discourse of what could be deemed “private corruption” (that is corruption of a private party by another private party) is defensible, and second, that both conceptual models sustain this interpretation. These conclusions enable the characterisation of a range of problematic actions as corrupt, while maintaining the connection to the core wrong of the compromising of a trusted position or position of power.

Corruption generally is understood as the abuse of public power for private profit or for a gain in power or status.<sup>26</sup> This gain in profit, power or status can be on the part of the corrupter, or the corrupted, or both. Though it often intersects with fraudulent behaviour, or may involve extortion, corruption is analytically (and legally) distinct from these wrongs.<sup>27</sup> The term encompasses a range of qualitatively distinct activities, such as bribery, where payments are demanded or expected in return for the operation of legitimate business practices; electoral corruption, where payments are made to acquire or maintain political influence; as well as the use of public office for personal gain, and nepotism, where one’s family is favoured in business or employment. So, while the terms bribery and corruption are often used interchangeably,<sup>28</sup> the latter is a broader overarching concept of which bribery is one manifestation.<sup>29</sup>

Crucially, corruption is not necessarily criminal, and conceiving of corruption as illegality is “simultaneously too narrow and too broad”:<sup>30</sup> an illegal act is not necessarily corrupt, and *vice versa*.<sup>31</sup> Indeed, there are kinds of corruption that are not criminal in English or Scottish law, such as nepotism and the asynchronous doings of favours, which is typical of cronyism.<sup>32</sup> In a moral or ethical sense, we tend to reserve the label “corruption” for those forms of influence that are at least *prima facie* dubious. To that extent, corruption is a morally loaded concept. Having said this, what is conceived of as corrupt is temporally, culturally and jurisdictionally contingent. We can imagine some situations where corruption, particularly bribery, is a means to a morally justifiable end, and where the contingent context shapes our judgment. So, for instance, the bribing of a concentration camp guard to facilitate escape might formally constitute corruption but

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<sup>26</sup> JS Nye, ‘Corruption and Political Development: A Cost Benefit Analysis’ (1967) 61 *American Political Science Review* 417; Susan Rose-Ackerman, *Corruption. A Study in Political Economy* (Academic Press, 1978); Transparency International, *Corruption In The UK: Part One – National Opinion Survey* (Transparency International, 2013) 14.

<sup>27</sup> See Law Commission, *Reforming Bribery* (Law Com CP No 185, 2007) para 1.31.

<sup>28</sup> Nicholas Lord, *Regulating Corporate Bribery in International Business* (Ashgate 2014) 15.

<sup>29</sup> Recognition of this may be seen in the shift in focus from the Corruption Bill 2003 to the Bribery Bill 2010.

<sup>30</sup> John G Peters and Susan Welch, ‘Political Corruption in America: A Search for Definitions and a Theory’ (1978) 78 *American Political Science Review* 974, 974-75.

<sup>31</sup> See John Noonan, *Bribes* (University of California Press 1984).

<sup>32</sup> Peter Alldridge, ‘The UK Bribery Act: “The Caffeinated Younger Sibling of the FCPA”’ (2012) 73 *Ohio State Law Journal* 1181, 1184.

would not be seen as be seen as morally problematic.<sup>33</sup> Furthermore, some corruption may be regarded as functional, insofar as its results serve a beneficial purpose.<sup>34</sup> An example of this would be the bribing of officials to facilitate economically or socially beneficial projects, like the construction of infrastructure. This implies that while corruption might still be morally and legally questionable it is sometimes, on balance, beneficial. So we can see that corruption is a malleable notion, reflecting a particular ideological stance and with variable consequences.

Furthermore, as intimated above, there is no offence of corruption *per se* and no statutory definition of corruption in the UK.<sup>35</sup> Despite the significance of the adverb “corruptly” in the Prevention of Corruption Acts 1889-1916, there was no definition or explanation in those Acts. And while the Bribery Act 2010 repealed and replaced these Acts, and applies to what may be viewed colloquially as corruption, it has moved away from the terminology of corruption to bribery, which is a narrower notion. In terms of case law, the House of Lords described “corruptly” in respect of the Corrupt Practices Prevention Act 1854 as meaning “not ‘dishonestly,’ but in purposely doing an act which the law forbids as tending to corrupt”.<sup>36</sup> This is a notably self-referential explanation. A rather optimistic view was put forward in *R v Wellburn* where the Court of Appeal stated that

Nothing is to be gained by using variations for statutory words in ordinary usage unless the context so requires and it does not do so in the 1906 [Prevention of Corruption] Act. A jury will have no difficulty in deciding whether an accused has corruptly accepted or obtained a gift.<sup>37</sup>

Despite concerns about the circular definition, one of its benefits (which may lead us to believe that the circularity is intentional) is that it gives conceptual discretion to juries. This is in keeping with the general trend in statutory interpretation at the time, namely that “the meaning of an ordinary word of the English language is not a question of law”.<sup>38</sup> As I discuss below, this embeds “public opinion” in defining corruption.

More recently, efforts have been made in a number of electoral court decisions to ascertain what constitutes corruption.<sup>39</sup> These cases concerned the Representation of

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<sup>33</sup> It is worth recalling section 7 of the Intelligence Services Act 1994 which allows the authorisation of (and thus renders legally unproblematic) actions done in the services of the Crown, which may or may not be morally dubious.

<sup>34</sup> See Nathaniel H Leff, ‘Economic Development Through Bureaucratic Corruption’ (1964) 8 American Behavioural Scientist 8.

<sup>35</sup> See Liz Campbell, ‘Organised Crime and Corruption in the UK: Responding Through Law’ [2016] Crim LR 20-36.

<sup>36</sup> *Cooper v Slade* (1858) 6 HL Cas. 746, 773. That definition was adopted and followed by the Court of Criminal Appeal in *R v Smith* [1960] 2 QB 423, 429 in relation to the Public Bodies Corrupt Practices Act 1889.

<sup>37</sup> (1979) 69 Cr App R 254, 264-265; followed in *R v J (P)* [2013] EWCA Crim 2287.

<sup>38</sup> *Brutus v Cozens* [1973] AC 854, 861.

<sup>39</sup> See eg *Erlam v Rahman* [2015] EWHC 1215 (QB); *Ali v Bashir* [2013] EWHC 2572 (QB).

the People Act 1983 which provides that a person shall be guilty of a “corrupt practice” if he commits, or aids, abets, counsels or procures the commission of the offence of personation,<sup>40</sup> if he is guilty of bribery,<sup>41</sup> or of “treating” (providing food, drink or entertainment).<sup>42</sup> Again, part of this Act is unhelpful in its circularity, in that it makes the finding of “corrupt practices” dependent on other offences, such as bribery, and circularity is evident where the corrupt practices are defined by reference to the adverb “corruptly”.<sup>43</sup> Indeed, the High Court in *Erlam v Rahman* stressed that “the whole scheme of corrupt and illegal practices and the arbitrary distinctions between the two should be reconsidered”.<sup>44</sup>

Given the lack of meaningful assistance from this jurisprudence, I now explore Heidenheimer’s suggestion that our definition of corruption could be based on public opinion (that is, the popular understanding of corruption), or it could centre on public office (where corruption is departure from the duties of this office), or on the public interest (namely that which is harmed by corruption).<sup>45</sup>

Corruption is sometimes defined and measured according to public opinion. Though far from a *vox pop* index, the perceptions of business people are key in terms of measuring corruption, in the methodology of Transparency International, for instance.<sup>46</sup> Despite this prominence in respect of measuring corruption (which is not without its critics<sup>47</sup>), relying on public opinion in defining the issue is not without problems. Public opinion may be wilfully blind, especially if there is a functional benefit of the behaviour, and it runs the risk of being over- or under-inclusive in terms of what it categorises as corruption. Also, if corruption has amorality at its core, then which “public” are we talking about, and whose morality?

As for the notion of public office, it is the violation of norms by such an office holder for private gain that is regarded as characterising corrupt acts.<sup>48</sup> One could question the meaning and inclusion of private gain here, given that it is the compromising of the norms that is dubious. In this context it is worth recalling the offence of misconduct in public office,<sup>49</sup> which is where a public officer acting as such, wilfully neglects to perform his duty and/or wilfully misconducts himself, to such a degree as to amount to an abuse

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<sup>40</sup> s 60.

<sup>41</sup> s 113.

<sup>42</sup> s 114.

<sup>43</sup> s 113(2)(b).

<sup>44</sup> [2015] EWHC 1215 (QB) [667].

<sup>45</sup> AJ Heidenheimer, *Political Corruption: Readings in Comparative Analysis* (Holt Rinehart and Winston 1970).

<sup>46</sup> See <<http://www.transparency.org/research/cpi/overview>>.

<sup>47</sup> Greg Michener, ‘Policy Evaluation via Composite Indexes: Qualitative Lessons from International Transparency Policy Indexes’ (2015) 74 *World Development* 184–196.

<sup>48</sup> Heidenheimer (n 45) 227.

<sup>49</sup> See Campbell (n 35).

of the public's trust in the office holder, without reasonable excuse or justification.<sup>50</sup> The centrality of public office and public trust is evident in this offence, which concerns what could be called "corruption".<sup>51</sup> There is no mention of gain or profit. In a broader conceptual sense, the focus on public office rather assumes uniformity and precise delineation of the scope of that office. This issue is becoming more significant in an era when more public functions are divested to private companies, such as prison security and transport to court, etc. Of course, this omits from the scope of corruption acts between solely private parties, an issue to which I return.

Finally, similar concerns about clarity of definition may be raised in terms of the public interest. Needless to say, not every kind of injury or threat to the public interest should count as a case of corruption. Furthermore, this concept has manifold legal meanings, serving as the basis for legislative tests, the core of some judicial review proceedings, and a limitation on rights. Nonetheless, as a potential focus for an understanding of corruption the public interest is appealing as it foregrounds the gravity and breadth of the harm that is caused by corruption, even if it does not bring us closer to a tightly defined notion.

As I hinted in relation to "public office", the standard view was that corruption pertained to the public sphere only.<sup>52</sup> In other words, the corrupted individual must hold a position of power in the public sector, and so could abuse that power for the benefit of a bribe payer, say. Nonetheless corruption is regarded also, though less frequently, as the abuse of private power – by this I mean the corruption of one private individual, such as the manager of a private company, by another person for private gain. This could involve the bribing of a decision maker in a firm to ensure the winning of a contract by a particular person or entity. Some definitions speak of "a power-holder" being induced by illegal rewards to take actions that favour the provider of the rewards.<sup>53</sup> This is sufficiently expansive to encompass "corruption" of private entities for private gain. Moreover, this gain need not be personal solely, but can involve organisational gain too. Individualising these behaviours shifts attention away from organisational, structural and cultural influences or the nature of the illicit relations between cooperating legitimate and illegitimate actors, markets and systems.

A key aspect here is the functionalist question, namely whether the sort of activities

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<sup>50</sup> *Attorney General's Reference (No 3 of 2003)* [2005] QB 73. The Law Commission is consulting on misconduct in a public office, and published an issues paper in January 2016: [http://www.lawcom.gov.uk/wp-content/uploads/2016/01/misconduct\\_in\\_public\\_office\\_issues-1.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2016/01/misconduct_in_public_office_issues-1.pdf)

<sup>51</sup> Though this offence addresses what would be regarded as corruption in public office, the (arguably emotive) word of corruption is not used. Misconduct, in contrast, suggests some kind of minor infraction. This is an interesting linguistic difference, between the strict legal setting and the tone of popular description.

<sup>52</sup> See n 26.

<sup>53</sup> Arnold Heidenheimer and Michael Johnston, *Political Corruption: Concepts and Contexts*, (3<sup>rd</sup> edn, New Brunswick 2002) 9.

engaged in by the private actor matter. In other words, must the actor be involved in quasi-state functions, or do we include what might be regarded as classically private actors? The latter is the approach adopted in Article 21 of the UN Convention against Corruption, of which concerns bribery in the private sector, as do various policy documents.<sup>54</sup> Moreover, as Peter Alldridge reminds us, the Law Commission considered and rejected some arguments for preserving the distinction between public and private sectors in relation to legislation on corruption, looking at the gravity of the harm, and the need for greater protection and for higher standards in the public context.<sup>55</sup> The Commission concluded that differences in gravity, and perceptions of the need for a higher standard in public office, should be reflected in sentencing, rather than substantive law.

I suggest that the public office component should not be decisive, and that corruption can indeed be “private”,<sup>56</sup> even where there is no functional equivalence to the exercise of public power. This is a descriptive and normative claim, that holds in both the policy and legal settings. As noted, some definitions of corruption focus on a “power-holder”,<sup>57</sup> while others hinge on a “trusted position”.<sup>58</sup> This could be characterised as focusing on potency and expectations respectively. For the purposes of this paper I remain agnostic about the chosen core of the definition, given that our choice is likely just to shift the definitional burden from power to trust. Instead, I argue that both power and trust can relate to the private setting, and that a private conception of corruption, though expansive, is defensible.

One who holds or occupies a particular position or role acquires certain responsibilities, both in relation to what she should or should not do, and in relation to the kinds of reason she should consider in deciding what to do. Corruption can then be seen to involve the persuading of a role-bearer to attend to improper reasons, though not all improper reasons will be corrupt. So, someone can be corrupt(-ed) in the performance of a role that is not a matter of public office. More to the point I suggest that criminal

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<sup>54</sup> See eg Commission, ‘A Union Policy Against Corruption’ (Communication) COM (97) 192 final.

<sup>55</sup> Peter Alldridge ‘Reforming the Criminal Law of Corruption’ (2001) 11 Criminal Law Forum 287, 295. Alldridge was referring to Law Commission, *Legislating the Criminal Code: Corruption* (Law Com No 248, 1998) paras. 3.28–3.31.

<sup>56</sup> See Stuart Green, ‘Official Bribery and Commercial Bribery: Should They Be Distinguished?’ in Jeremy Horder and Peter Alldridge (eds.), *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press, 2013); Tanja Rabl, *Private Corruption and Its Actors: Insights Into The Subjective Decision Making Processes* (Pabst, 2008).

<sup>57</sup> Heidenheimer and Johnston (n 53); See Robert Dahl ‘The Concept of Power’ (1957) Behavioral Science 201.

<sup>58</sup> See Sung Hui Kim, ‘Insider Trading as Private Corruption’ (2014) 61 UCLA Law Review 928, 954; Transparency International speaks of the “abuse of entrusted power for private gain” <<http://www.transparency.org/what-is-corruption/>>. Indeed, this is reminiscent of the statement of Lord Mansfield in *R v Bembridge* regarding a public officer having “an office of trust concerning the public, especially if attended with profit” (1783) 3 Doug KB 32.

justice agencies and the law should properly take an interest in corruption in roles that are not public offices.

So, in this respect I agree with the NCA that a definition of corruption by organised crime should take in the corruption of private power holders and trustees. Acceptance of this proposition would encompass those in public office or public service such as juries, in addition to those in regulated professions and in the private sector where the individual is trusted or holds a position of power. Unsurprisingly, this is not an infallible means of categorisation, and there may be some hard cases. Some may argue that such an expansive approach dilutes the concept by encompassing problematic behaviour in the private context. My claim is that looking at the abuse, rather than the location, of a role, is defensible in general, and particularly in relation to organised crime. This is so the definition conveys the breadth and gravity of the “corruption” of private parties, and adequately reflects what occurs in practice.

Support for an interpretation that encompasses “private corruption” can be drawn from two different models of the harm in corruption, the first centring on the principal and agent relationship and the second on the market.<sup>59</sup> Though the preferred model will influence the structure and focus of the law enacted, I suggest that ultimately both models allow do not differ greatly. Nonetheless, the latter is apposite in capturing neatly the wrong in corrupt behaviour by OCGs.

First, the orthodox view of corruption is that it compromises a proscriptive duty and thereby offends against the relationship and loyalty between a principal and agent.<sup>60</sup> Here the harm is viewed as deriving from the agent acting in a way that compromises or conflicts with the interests of her principal. We can view this as a “shell” or shallow theory insofar as the wrong lies in the breach of duty,<sup>61</sup> without evaluating the underlying normative basis of the duty. The Law Commission subscribed to such an approach in respect of bribery, stating “An advantage is a corrupt inducement if it is intended to influence an agent in the performance of his or her functions as agent.”<sup>62</sup>

According to this understanding, an existing principal-agent relationship is necessary because the harm derives from an action pertaining to that existing legal duty.<sup>63</sup> This account limits the scope of the notion of bribery insofar as it is predicated on a relationship, which may be difficult to prove, or may not exist. Just paying someone to commit a crime is not, without more, bribery. The trouble with relying on legal duties is that if this includes duties imposed by contracts of employment those contracts can be

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<sup>59</sup> Law Commission, *Reforming Bribery A Consultation Paper* (Law Com CP No 185, 2007) p 27. The Commission also refers to improper payment/influence/conduct.

<sup>60</sup> See Nye (n 26) 419.

<sup>61</sup> Laura S Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (Yale UP, 2013).

<sup>62</sup> Law Commission, *Legislating The Criminal Code: Corruption* (Law Com No 248, 1998) para. 5.73. See Alldridge n 32.

<sup>63</sup> Alldridge (n 55) 290.

drawn so as not to impose the duty.<sup>64</sup> It is notable that the Bribery Act 2010 essentially abandoned the agent-principal relationship by moving away from the breach of duty to an identifiable person, in favour of an intention to induce improper conduct.<sup>65</sup> Moreover, the OECD has shown increasing antipathy to the principal-agent distinction as the basis for the definition of bribery.<sup>66</sup>

A further problem with the duty model is that it presupposes the existence of a benevolent principal.<sup>67</sup> It also raises the question of who occupies which role or position: is the corrupted state official the agent and the public the principal, or is the state the principal? That is the difficulty with the conceptualisation of a fiduciary as a matter of public law. Having said this, there may be a distraction in focusing specifically on the fiduciary-style duties of loyalty. Public officials may not be required to exercise anything quite that strong; it may just be that they have duties to act only on certain reasons, or certain interests, in exercising their powers. In addition to these limitations, the remedy for corruption under the duty model lies in addressing the institutional setting or incentives for the principal.<sup>68</sup> Such deterrent or responsive measures seem to address only certain forms of corruption, and omit interactions where there is no clear or identifiable duty or duty holder.

The duty approach has been challenged by scholars such as Peter Alldridge, who reframes the issue as an offence against the market.<sup>69</sup> Alldridge argues that locating the harm in bribery in that which is done to the principal obscures the real wrong and overlooks the range of actors involved.<sup>70</sup> He prefers to account for the harm by looking at these actors in the context of a market. Unlike the focus on duty, he claims that this approach reveals an important distinction between distorting the operation of a legitimate market and operating a market in things that should never be sold.<sup>71</sup> While it may appear that this limits unduly the notion to economic outcomes and forms of corruption, in fact it is sufficiently expansive to include the operation of a market in, or the commodification of, things that should not be monetised or sold. I suggest that the

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<sup>64</sup> Peter Alldridge, 'Reforming Bribery: Law Commission Consultation Paper 185 (1) Bribery Reform and the Law Commission – Again' (2008) *Criminal Law Review* 671-690.

<sup>65</sup> Alldridge n 32.

<sup>66</sup> *OECD United Kingdom: Phase 2bis Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and The 1997 Recommendation on Combating Bribery in International Business Transaction* (OECD, 2008) para 42.

<sup>67</sup> Toke S Aidt, 'Economic Analysis of Corruption: A Survey' (2003) 113 *The Economic Journal* F632-F652. For a defence of the duty/principal model see Susan Rose-Ackerman, 'The Institutional Economics of Corruption' in Gjalte De Graaf and others (eds), *The Good Cause: Theoretical Perspectives on Corruption* (Barbara Budrich Publishers, 2010) 49.

<sup>68</sup> Jan Teorell 'Corruption as an Institution: Rethinking the Origins of the Grabbing Hand' in QoG Working Paper Series, (The Quality of Government Institute, Göteborg University, 2007).

<sup>69</sup> Alldridge (n 55) 288-289; Peter Alldridge 'The UK Bribery Act: "The Caffeinated Younger Sibling of the FCPA"' (2012) 73 *Ohio State Law Journal* 1181-1216.

<sup>70</sup> Alldridge (n 55) 298.

<sup>71</sup> *Ibid* 301.

interpretation of market here is broad enough to encompass a scenario even where only one specific transaction is possible with only one buyer and seller, as it involves the sale of something that should not be available for purchase or profit. Moreover, the concept of a market does not appear to exclude non-financial transactions, as a personal gain in power for instance seems a marketised reward for behaviour. In other words, this idea extends to dealings that are not purely economic in nature. Nonetheless, the market approach could be said to set unwarranted limits on the kinds of motive or reason that could be involved in corruption: an official who abuse his office out of personal love surely is acting corruptly, but does not seem to be marketising anything and so this does not constitute bribery. Even so, in the case of the creation of a market in the judicial system (such as a judge receiving payment from someone other than her state employer so as to decide a case in a particular fashion) the illegitimate transaction is constituted by the mere fact of that advantage and so represents corruption.<sup>72</sup>

Considering corruption by organised crime in particular, I suggest that both the duty and the market models are valid, but that the latter is more apt. In any case, a singular or unified model of corruption may be unattainable, and so a diversity of understandings, and thus responses, is required instead. Corruption by organised crime may compromise a duty, but this is dependent on a duty existing in the first place. I suggest that corruption by organised crime always satisfies the market model, insofar as it creates an illegitimate “transaction”, such as where officials typically are not entitled to consider payments, for the gain of an OCG.

Although I do not aim to offer a single or unifying definition, this analysis of corruption as it relates to organised crime has defended a private conception of corruption that involves an illegitimate transaction. This intersects with but differs somewhat from the extant policy definition. Overall, this account demonstrates the multifaceted and contested nature of corruption. I now turn to organised crime, as a concept and a term of art.

### ***b. Organised crime***

Organised crime occupies a position of prominence in political and criminal justice discourse in the UK, though like corruption it remains without an “agreed-upon definition”.<sup>73</sup> And for present purposes, it is notable that some, though not all, definitions of organised crime are predicated on the use of corruption.

The meaning and understanding of organised crime differs, between and within the academic, legal or political contexts. The term has been said to describe specific

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<sup>72</sup> *ibid* 304.

<sup>73</sup> Petrus C Van Duyne, ‘The Phantom and Threat of Organized Crime’ (1996) 24 *Crime, Law and Social Change* 341, 343.



structures or organisations that are involved in criminality; the provision of illegal goods or services; or a certain type of crime that meets a given level of gravity and continuity.<sup>74</sup> Finckenauer, for instance, holds that although some crimes may be complex and highly organised, they do not constitute “organised crime” unless they are committed by criminal organisations.<sup>75</sup> One could argue that such a dichotomous approach fails to recognise that organised crime involves a spectrum of organisation. To this end, Mike Levi prefers the term “organizing crime” to depict profitable crimes that need a high level of organisation.<sup>76</sup> Beyond this, there are variants of organised crime, such as its transnational form, which is organised crime with a cross-border dimension.<sup>77</sup>

As for any nexus between corruption and organised crime, corruption varies from being viewed as an integral part of organised crime to a pragmatic necessity for its survival. Some scholarly definitions of organised crime refer to corruption explicitly. Michael Maltz suggests that organised crime includes violence, corruption, continuity, and variety in the types of criminality engaged in.<sup>78</sup> James Finckenauer and Yuri Voronin describe organised crime as that committed by criminal organisations whose existence has continuity over time and across crimes, and that use systematic violence *and corruption* to facilitate their activities.<sup>79</sup> Furthermore, taking a historical perspective, as propounded by Michael Woodiwiss, is instructive as it demonstrates how the term “organised crime” was once synonymous with local political corruption.<sup>80</sup> This earlier connection with corruption is striking and demonstrates how readily the concepts map onto each other.

For other scholars, rather than being a definitional prerequisite, organised crime’s continued existence is based on the corruption of state personnel,<sup>81</sup> and the complexity

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<sup>74</sup> See Letizia Paoli and Tom Vander Beken ‘Organized Crime: A Controversial Concept’ in Letizia Paoli (ed) *Handbook of Organized Crime* (OUP 2014); Letizia Paoli and Cyrille Fijnaut, ‘Organised Crime and Its Control Policies’ (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice* 307, 308; Niall Hamilton-Smith and Simon Mackenzie, ‘The Geometry of Shadows: A Critical Review of Organised Crime Risk Assessments’ (2010) 20 *Policing and Society* 257, 261.

<sup>75</sup> James O Finckenauer, ‘Problems of Definition: What is Organized Crime?’ (2005) (8) *Trends in Organized Crime* 63, 76.

<sup>76</sup> Michael Levi, ‘The Organisation of Serious Crimes for Gain’ in Mike Maguire and others (eds), *The Oxford Handbook of Criminology* (5<sup>th</sup> edn, OUP 2012) 597.

<sup>77</sup> See UN Convention Against Transnational Organised Crime; Adam Edwards and Peter Gill (eds) *Transnational Organised Crime: Perspectives on Global Security* (Routledge 2006).

<sup>78</sup> Michael D Maltz, ‘On Defining “Organized Crime”: The Development of a Definition and a Typology’ (1976) 22 *Crime and Delinquency* 338.

<sup>79</sup> James O Fickenauer and Juri A Voronin, *The Threat of Russian Organised Crime* (National Institute of Justice 2001) 2.

<sup>80</sup> Michael Woodiwiss, ‘Transnational Organized Crime: The Strange Career of an American Concept’ in M Beare (ed) *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption* (University of Toronto Press 2003) 4.

<sup>81</sup> See Jay Albanese, ‘The Causes of Organized Crime: Do Criminals Organize Around Opportunities For Crime Or Do Criminal Opportunities Create New Offenders?’ (2000) 16 *Journal of Contemporary Criminal Justice* 409, 411.

of organised crime may be dependent on effective corruption. As Mike Levi notes, highly organised crime is less likely to flourish in the absence of corrupt alliances between criminal justice officials, politicians and suppliers of illegal commodities,<sup>82</sup> and it has been argued that the most successful criminal organisations make strategic use of violence and systematic use of corruption to weaken official oversight and law enforcement.<sup>83</sup> Louise Shelley sees corruption as an operative tool for what she deems to be “traditional” organised crime, but similarly “new transnational” crime depends on high levels of systemic and institutionalised corruption.<sup>84</sup> Likewise, Petrus Van Duyne argues that organised crime-entrepreneurs engage in corruptive relations only if the risks (such as the sharing of information) are offset by expected advantages.<sup>85</sup> In other words, the approach of the entity will be context-specific. In some cases, systemic corruption might be beneficial to a group, perhaps particularly so in those developing states with weaker and less diverse sites of authority. One could speculate that in some contexts, especially in jurisdictions with robust rule of law protections and sophisticated mechanisms of oversight, the optimal approach would be one-off or “selective” acts of corruption because systemic corruption is not needed, and would risk discovery.

Thus, though the two concepts undoubtedly are linked,<sup>86</sup> there is divergence as to whether corruption is a necessary definitional aspect of organised crime, or a valuable facilitating factor. This is both an empirical and conceptual question, to which the answer may be jurisdictionally specific. I suggest that organised crime may, but need not, involve corrupt acts: rather than being a necessary component, corruption is a strategic mechanism used by OCGs. This reflects the nature of organised crime in the UK, where it is regarded as not exerting a systematic influence over the legitimate economy or the political system in the UK,<sup>87</sup> though corruption in other sectors is

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<sup>82</sup> Michael Levi, ‘Policing Fraud and Organised Crime’ in Tim Newburn (ed), *Handbook of Policing* (2nd ed, Willan 2008) 522.

<sup>83</sup> International Narcotics Control Board, *Annual Report, “Chapter One – Drugs and Corruption”* (United Nations, 2010) 3.

<sup>84</sup> Louise Shelley, ‘The Unholy Trinity: Transnational Crime, Corruption, and Terrorism’ (2005) 11 *Brown J World Aff* 101, 106.

<sup>85</sup> Petrus Van Duyne, ‘Organized crime, corruption and power’ (1996) 26 *Crime, Law and Social Change* 201, 205.

<sup>86</sup> RT Naylor, ‘Predators, Parasites, or Free-Market Pioneers: Reflections on the Nature and Analysis of Profit-Driven Crime’ in M Beare (ed) *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption* (University of Toronto Press 2003) 35–54; Shelley (n 84).

<sup>87</sup> Paoli and Fijnaut (n 74) 312; Tihomir Bezlov and Philip Gounev, ‘Organised Crime, Corruption and Public Bodies’ in Gounev and Ruggiero (n 9) 73. Indeed, in the only existing survey in the UK on public perceptions of organised crime, there was no mention of corruption or bribery (Scottish Government, *Public Perceptions of Organised Crime in Scotland* (Scottish Government Social Research, 2013) 3, Top 10 responses). When asked what types of illegal activity they typically associate with organised crime, people in Scotland were most likely to cite drug dealing/trafficking, followed by money laundering, and people/human trafficking for sexual or labour exploitation. This underlines the problems of constructing our definition or understanding around public opinion, as it is too narrow and steered by political and media representations, and seems to hinge on the obvious harm as perceived by the public.

evident.<sup>88</sup> Were we to view corruption as a core ingredient of organised crime, it would render redundant any perception and any policy approach based on this perception that corruption by organised crime is a novel issue, as we could never have had organised crime without corruption. And certainly, such a stance further collapses these concepts into each other.

While I have suggested that corruption is not a necessary definitional aspect of organised crime, in a domestic policy sense the link is made more and more frequently. Corruption is described as a “widely used tactic”<sup>89</sup> and “enabler” of organised crime,<sup>90</sup> and a means of avoiding detection,<sup>91</sup> though there is little (publically available) evidence for such claims. Notably, the UK’s most recent Serious and Organised Crime Strategy moves beyond emphasising that bribery and corruption are tools of serious and organised crime<sup>92</sup> to state that organised crime is “characterised by violence or the threat of violence *and* by the use of bribery and corruption” [my emphasis].<sup>93</sup> The Scottish Government makes the same connection.<sup>94</sup> Nonetheless, we can imagine that such discourse is not likely to preclude recognition of organised crime that relies on just one such component.

Shifting to a legal perspective, as yet there is no statutory definition of “organised crime” anywhere in the UK. The Serious Crime Act 2015 (which applies in England and Wales) criminalises participation in activities of an organised crime group, but the offence centres on the notion of such a group, rather than on the criminality itself.<sup>95</sup> Section 45 provides that an OCG has as its/a purpose the carrying on of criminal activities, and comprises at least three persons acting together or agreeing to do so to further that purpose. “Criminal activities” are offences punishable with imprisonment for at least seven years, carried on in England or Wales (or elsewhere as long it is as a crime there and is punishable comparably), with a view to obtaining any gain or benefit. And strictly speaking, organised crime is not defined in Scotland, rather “serious organised crime” is. This is crime involving just two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of such, where “serious offence” means an indictable offence committed with the intention of obtaining a material benefit, or an act or threat of violence made with the intention of obtaining such benefit in future.<sup>96</sup> So it is evident that in legislating against

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<sup>88</sup> Vincenzo Ruggiero and Philip Gounev, ‘Corruption and the disappearance of the victim’ in P Gounev and V Ruggiero (n 9) 27; Europol, *OCTA 2009: EU Organised Crime Threat Assessment* (European Police Office, 2009) para 5.6.

<sup>89</sup> HM Government, *Local to Global: Reducing the Risk from Organised Crime* (Stationery Office, 2011) 6.

<sup>90</sup> National Crime Agency (n 2) 13.

<sup>91</sup> HM Government (n 89) 11 and 21.

<sup>92</sup> Home Office (n 1) 26.

<sup>93</sup> *ibid* 2.6.

<sup>94</sup> Scottish Government (n 4) para 47.

<sup>95</sup> See Liz Campbell, ‘The offence of participating in activities of organised crime group: section 45 of the Serious Crime Act 2015’ (2015) 10 *Archbold Review* 6.

<sup>96</sup> Criminal Justice and Licensing (Scotland) Act 2010, s 28(3).

organised crime in the UK, corruption is not mentioned. Were legislative definitions to do so, this would complicate prosecutions still further, and so its omission is entirely understandable, if unhelpful for present purposes.

Finally, it is worth considering whether corruption can constitute organised crime in a legal sense. Corrupt practices like bribery could fall within the remarkably broad Scottish definition of serious organised crime in s 28(3) of the Criminal Justice and Licensing (Scotland) Act 2010, but not within the more limited definition in the 2015 Act. So, we can see that legally, some corrupt acts will constitute serious organised crime, though they are conceptually distinct ideas.

#### **4. Drawing the boundaries of corruption by organised crime?**

These definitional complexities indicate key descriptive and normative issues, namely how difficult it is to determine what constitutes corruption by organised crime, and what should be deemed to warrant this label. I suggest there is no bright line or threshold in this respect. Rather we should be mindful that “organised crime” is a *way* of organising crime,<sup>97</sup> and that corruption is a tactic used in this enterprise. Thus organised crime could be seen as the site or the source of corruption, depending on the given scenario.

Next I examine two issues that are relevant in locating the boundaries of corruption by organised crime: one, the distinction, if any, between it and cognate concepts, and two, whether the involvement of organised crime in any process or system renders that system “corrupted”.

It is useful to view corruption by organised crime as one end of a continuum of tactics, with other problematic behaviours located along it. Policy discourse in this area involves a spectrum of descriptors, ranging from infiltration,<sup>98</sup> through complicity, collusion,<sup>99</sup> through to corruption. This range of involvement is captured neatly in the UK’s Serious and Organised Crime Strategy, which stresses that organised criminals very often depend on the assistance of corrupt, complicit or negligent professionals.<sup>100</sup> None of these terms is straightforward or tightly defined. Moreover, it is debateable whether the choice of descriptor is important, that is, whether regarding certain behaviour as corruption rather than collusion, say, is significant, or defensible.

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<sup>97</sup> See Edwards and Gill, n 17.

<sup>98</sup> Europol, *The EU Serious and Organised Crime Threat Assessment* (Europol 2013) 1.4. Also see E Savona and G Berlusconi (eds), *Organized Crime Infiltration of Legitimate Businesses in Europe: A Pilot Project in Five European Countries, Final Report of Project Ariel* (Transcrime, 2015).

<sup>99</sup> See P Gounev and T Bezlov (n 87) 17.

<sup>100</sup> Home Office (n 1) 2.6.

I propose that collusion, complicity and so on are distinct terms, mechanisms and activities that should not be confused with corruption. One can be complicit in organised crime or collude with organised crime groups without being corrupt; the distinguishing element is the position of trust or power that is abused or commoditised in the latter instance and the moral condemnation that accompanies the use of such a term. That being said, corruption by organised crime always involves complicit individuals: complicity is a prerequisite of, though not analogous to, corruption. Moreover, while the term “infiltration” may be the appropriate moniker in respect of certain activities,<sup>101</sup> it conveys a hermetically sealed legitimate entity or enterprise that is contaminated by the incursion of organised criminality. This seems like too sure a separation in many instances, and does not denote the consensual mode of action which is involved in much corruption (save in scenarios where the corrupted individual is being extorted). Indeed, in respect of infiltration, one might question what distinguishes the actions of an organised crime group in this respect from an aggressive or unscrupulous market player. Though each depiction may be empirically apt in a given circumstance, I suggest that corruption is the most appropriate generic term where there is an abuse of a position of power or trust by organised crime for gain, be that for the corrupting group, or the corrupted party. Only this label communicates adequately the gravity of the compromising of that position, and the mutually beneficial aspects of the interaction.

As I have outlined, corruption and organised crime intersect with and sometimes map directly onto each other. In doing so they threaten the traditional demarcation between the “legitimate” world and otherwise, as the use of corruption can make it difficult to delineate a clear conceptual boundary between organised crime and ostensibly white-collar crime,<sup>102</sup> namely the “abuse of a legitimate occupational role which is regulated by law”.<sup>103</sup> Nonetheless, as Mike Levi notes, there is increased interest in organised crime “enablers” who operate in the “hinterland of crime commission”<sup>104</sup> and who may be involved in corruption, as well as providing professional expertise.<sup>105</sup> So it is not the case that professionals are neglected in a policy or strategic sense in relation to such criminality, rather that it is seen as a different and separate matter, and labelled differently too.

Scholars such as Vincenzo Ruggiero have highlighted the difficulty in distinguishing between legitimate and illegitimate businesses and suggest that it is spurious to

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<sup>101</sup> See Victorian Law Reform Commission, *Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries* (Victorian Law Reform Commission 2016).

<sup>102</sup> See Nicole Piquero and Jay Albanese, ‘The Relationship Between Corruption and Financial Crime’ in Adam Graycar and Russell G Smith (eds), *Handbook of Global Research and Practice in Corruption* (Elgar 2011).

<sup>103</sup> Hazel Croall, *Understanding White Collar Crime* (Open University Press 2001) 6.

<sup>104</sup> David Middleton and Michael Levi, ‘Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation of Legal Services’ (2015) 55 *British Journal of Criminology* 647.

<sup>105</sup> Europol (n 98) 1.5.

consider corporate, white collar and organised crime separately.<sup>106</sup> Any differences here are obscured further by the reliance on and use of corruption. As Ruggiero claims, this is not an unnatural relationship between one dysfunctional entity and a harmonious one, rather a joint undertaking of two loosely regulated worlds.<sup>107</sup> White-collar crime often is distinguished from organised crime on the basis that it involves the abuse of a legitimate and regulated occupational role.<sup>108</sup> In other words, the position of the actor is the basis for the distinction. However, the involvement of professionals in providing advice to OCGs and otherwise facilitating criminality underlines the porousness of any border between the two forms of crime. While I have argued elsewhere that ultimately the use or threat of violence that underpins the provision of illegal goods or services permits a distinction to be made,<sup>109</sup> this is confounded by the use of corruption to replace or pre-empt violence. One could claim that the corruption itself is backed up by violence, but again this does not capture the range and nature of OCGs, not all of which involve violence. In other words, these categories of criminality collapse into each other when corruption is used in relation to organised crime, indicating that there are not analytically clear or useful distinctions. So, whether we frame the issue as the involvement by professionals, trusted parties or public officers in the organised crime enterprise, or as the corruption by organised crime of such parties, it remains predicated on an apparently clear distinction between organised crime and the involved or corrupted parties. The continuing description of certain acts as organised crime and the exclusion of others maintain the “othering” of organised crime in parcelling it away from a “law abiding” and victimised society.<sup>110</sup>

The next question is whether the involvement of organised crime in any process or system renders that system corrupted. In other words, does the granting of a license to an OCG or does an OCG’s winning of a public procurement contract constitute corruption *de facto*? I disagree with the NCA’s National Strategic Assessment, which speaks of corruption as the perversion of “a process or function of an organisation to achieve a criminal goal”.<sup>111</sup> This is too broad an understanding of corruption by organised crime in the context of criminal justice policy. While an expansive position that describes this as corruption conveys the compromising of a legitimate system that may occur, the acts of the licensed group in this particular context may not be corrupt. Indeed, one could conceive of a situation where the officer or body grants the licence or contract without knowledge of the group’s provenance and intentions, on the basis that this group has shown that it could do an excellent job. The fact that the entity comprises

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<sup>106</sup> Vincenzo Ruggiero, *Organized and Corporate Crime in Europe: Offers That Can’t Be Refused* (Aldershot 1996); John Lea, *Crime and Modernity* (Sage 2002) 144-146.

<sup>107</sup> Lea (n 106) 177.

<sup>108</sup> Hazel Croall, *White Collar Crime: Criminal Justice and Criminology* (Open University Press 1992) 9. See E Sutherland, ‘White-Collar Criminality’ (1940) 5 *American Sociological Review* 1.

<sup>109</sup> Liz Campbell, *Organised Crime and the Law* (Hart Publishing 2013) 18; see also Alan Wright, *Organised Crime* (Willan 2006) 63.

<sup>110</sup> See Edward Kleemans, ‘Theoretical Perspectives on Organized Crime’, in Paoli (ed) (n 74) 33.

<sup>111</sup> National Crime Agency (n 22) para 117.

an OCG might make the decision unpalatable in the sense that it would enable the OCG to further its criminal purpose, and may involve “perversion” as noted in the NCA definition, but we cannot consider the process as having being *corrupted* by its mere involvement without more. Relatedly, but more broadly, it cannot be said that anything an OCG does that relies on or benefits from legitimate actors or processes constitutes corruption. The presence of or association with organised crime in an otherwise non-criminal setting need not compromise a position of power or trust and so is not necessarily corruptive.

All of this implies a moving away from the expansive and underspecified interpretation of “corruption by organised crime”. Having rejected the NCA’s efforts to elucidate its meaning, however, I do not propose any alternative, more restrictive definition, be that for policy or legal purposes. Indeed, were I to do so, especially in respect of the law, I would need to grapple with the expectations of the corruptee’s trusted position or position of power, the meaning of facilitating the abuse of that position for the group, and the degree of knowledge on the part of the corruptee as to the nature or intention of the OCG. To this end, on the one hand, one could support a robust labelling process, on which a strong prophylactic legal regime could be based, while the exclusion of a knowledge requirement might risk the criminalisation of those who act from good faith/ignorance. But my effort here is not to define a potential offence or to mark a clear-cut threshold, but rather to illuminate the problems with and implications of the current policy definition and usage. It is not the case that a single and precise definition is needed, but rather careful reflection on what referring to “corruption by organised crime” entails and omits.

## 5. Concluding remarks

It is difficult to ascertain the extent to which OCGs are involved in or employ corruption in the UK.<sup>112</sup> Though the NCA states that “the impact of corruption is disproportionate to the level and frequency at which it occurs”,<sup>113</sup> this claim is hard to verify or dispute, given the contested nature of these terms and the inherent difficulty in quantifying the nature and degree of corruption. Despite this, what *is* apparent is an increased awareness of and increased policy focus on corruption by organised crime, underlining the importance of determining the term’s meaning and scope.

While the breadth of both “corruption” and “organised crime” undermines the analytical value of their amalgamated construct, arguably this imprecision is not so pressing in respect of policy. One could regard the term as convenient shorthand for a

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<sup>112</sup> For details of its commission elsewhere see Edgardo Buscaglia and Jan van Dijk, ‘Controlling Organized Crime and Corruption in the Public Sector’ (2003) 3 *Forum on Crime and Society* 3 and Alexander Sukharensko ‘The Use of Corruption by “Russian” Organized Crime in the United States’ (2004) 8 *Trends in Organized Crime* 118.

<sup>113</sup> National Crime Agency (n 2) 13.

multiplicity of acts, and consider that policy documents cannot convey the conceptual nuances of any phenomenon. The NCA's definition is not an operational one, and there is no evidence of it impacting on policing practice. Nonetheless, the mere use of the term in the policy setting has a mobilising force and helps to galvanise action. As I have observed elsewhere, expansive terms and stretched comparisons are appealing and familiar in relation to organised crime.<sup>114</sup> Therefore reflection and caution is warranted, and some clarity is needed if we are to identify and measure changes.

A further problem with an expansive interpretive approach is of diluting the meaning of corruption. Settling on some parameters of corruption by organised crime helps us identify and label appropriately the wrong in such behaviour. Describing something as corrupt is different to claiming it is illegal or criminal only; the focus moves from the breach of a formal rule solely to denoting something about the nature and morality of the actor and the breach of the social order. Calling something or someone corrupt implies that an entrusted position has been betrayed or compromised.

Framing the issue generically as "corruption by organised crime" is plausible in some respects, but this should be replaced with more definitional and operational focus on specific areas. As Warren reminds us, there is no one "problem" of corruption, but rather "each domain requires a conceptualization appropriate to the kind of corruption to which it is susceptible".<sup>115</sup> This indicates that a single definition of "corruption by organised crime" *per se* is not needed or attainable, rather specific policy and legal descriptions of and responses to different forms of behaviour. Such context- and sector-specific descriptors would adequately convey the nature and locus of the problem, such as organised corrupt practices in respect of the judicial system.

All that said, as yet there is no suggestion that the conceptually loose term "corruption by organised crime" will shift from the policy context into legal discourse. Though this may mean that the imprecision is not as pressing and problematic as it could be, we should not be sanguine. The identification and construction of the problem of corruption by organised crime leads to escalation of concern and demands some form of criminal justice response. Existing law in this area leaves a lot to be desired: section 45 of the Serious Crime Act 2015 manages to be both narrow and broad,<sup>116</sup> while the Bribery Act 2010 is part of a piecemeal response.<sup>117</sup> Careful reflection is needed both in terms of political discourse and policy analysis, lest further legislation in this context be prompted and influenced.

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<sup>114</sup> See Liz Campbell, 'Organized Crime and National Security: A Dubious Connection' (2014) *New Criminal Law Review* 225.

<sup>115</sup> Mark Warren, 'The meaning of corruption in democracies', in P Heywood *Routledge Handbook of Political Corruption* (Routledge 2015).

<sup>116</sup> See Campbell (n 95).

<sup>117</sup> See Jeremy Horder, 'Deterring Bribery: Law, Regulation and the Export Trade', in Horder and Alldridge (eds), *Modern Bribery Law* (Cambridge University Press, 2013).